Supreme Court, U.S.
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No. 78-1633

In the Supreme Court of the United States

OCTOBER TERM, 1978

GARY E. HALLMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner seeks review of his conviction for income tax evasion on the ground that the government's opening net worth figure was invalid because it did not take into account his wife's assets and liabilities and therefore failed to negate the possibility that the increases in his net worth might have been attributable to his wife's assets.

After a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted of evasion of the joint income tax liabilities of himself and his wife for 1970 and 1971, in violation of 26 U.S.C. 7201 (Tr. 167).[1] The district court sentenced him to concurrent two-year terms on each of the two

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[1] "Tr." refers to the trial transcript.

counts, but suspended the sentence of imprisonment and placed him on three years' probation. The court also imposed a $10,000 fine on each count (Tr. 179-180).

The prosecution relied on the well-established net worth method of proof. The government presented evidence that petitioner failed to report income derived from gambling activities and, as a result, understated the income tax liability on his joint tax returns by $10,449.40 in 1970 and $26,311.65 in 1971 (Tr. 103-104). The evidence, including evidence of petitioner's gambling activities, was largely stipulated. The government established that at the end of 1969 petitioner's liabilities exceeded his assets by $388.06 (Tr. 77-78). This opening figure formed the basis for the government's proof of increases in petitioner's net worth during 1970 and 1971.

The evidence also established that petitioner married Shari Hallman during 1969. In computing petitioner's opening net worth, the government did not take into account any assets separately owned by petitioner's wife at the close of 1969 (Tr. 107).[2] Petitioner challenged the accuracy of the government's opening net worth figure on the ground that it did not take into account his wife's assets. The district court denied petitioner's motion for judgment of acquittal on this ground (Tr. 157-167). The court of appeals affirmed (Pet. App. A). On the facts of this case, the court concluded that the government had "no obligation to prove the spousal net worth because of the absence of any evidence that Mrs. Hallman had

[2]During 1969-1971, petitioner and his wife were residents of California. Each spouse's property rights were therefore governed by California's community property law. Under that law, any property owned by petitioner's wife prior to marriage and brought into the marriage remained her separate property. See Cal. Civil Code § 5107 (West).

significant earnings, and because a stipulation of fact entered into between the parties expressly provided that [petitioner] received no gifts, loans, inheritances or any other kind of non-taxable receipts during the calendar years 1969, 1970 and 1971" (Pet. App. A-3).

1. Petitioner contends (Pet. 5) that the government's failure to take into account his wife's net worth is contrary to *United States* v. *Meriwether*, 440 F. 2d 753 (5th Cir. 1971), and that the decision below is in conflict with that case. In *Meriwether*, the court reversed a conviction for income tax evasion because, inter alia, "the Government failed to establish with reasonable certainty a definite opening net worth of the *joint income* of Meriwether and his wife" (*id.* at 755; emphasis in original). In so holding, the court observed that the government's computations virtually ignored the defendant's wife and, apart from introducing her state income tax returns into evidence, made no attempt to ascertain her net worth.

Here, however, as the court of appeals pointed out (Pet. App. A-3), the rule of *Meriwether* is not implicated because it was stipulated that petitioner received no non-taxable receipts during 1969-1971. On the basis of this stipulation, the court below correctly concluded that there was no factual issue as to whether petitioner's wife transferred separate property to him that might have been part of his net worth. While petitioner argues (Pet. 15) that the stipulation should not be read to cover his wife's separate property as a source of non-taxable receipts, the court of appeals' interpretation of the stipulation is consistent with its precise terms. At all events, this fact-bound question does not warrant review by this Court.

2. Contrary to petitioner's argument (Pet. 14-15), the fact of his marriage in 1969 did not of itself raise the inference that his wife had transferred separate property

to him and require the government to negate that possibility. The joint income tax returns filed by petitioner and his wife supported the inference that petitioner's wife had brought a meager income into the marital community (Tr. 143-144) and suggested that she did not possess substantial assets at the time of the marriage. Since petitioner failed either before or during trial to identify his wife as a potential source of non-taxable funds, the court of appeals correctly concluded that the government had established a *prima facie* case. "Once the Government has established its case, the defendant remains quiet at his peril." *Holland* v. *United States*, 348 U.S. 121, 138-139 (1954). Because of his failure to supply any relevant leads during the investigation, the court of appeals properly rejected petitioner's belated claim that his wife might have possessed substantial assets which she might have conveyed to him (Pet. App. A-4 to A-6). Accord, *United States* v. *Bianco*, 534 F. 2d 501, 506 (2d Cir.), cert. denied, 429 U.S. 822 (1976). As this Court has stated: "* * * [W]here relevant leads are not forthcoming, the Government is not required to negate every possible source of nontaxable income, a matter *peculiarly within the knowledge of the defendant*." *Holland* v. *United States, supra*, 348 U.S. at 138 (emphasis supplied).

In sum, absent any evidence that petitioner's wife had substantial assets, the court of appeals correctly held that the government was not required " 'to hypothesize them (spousal assets) out of nothing' " (Pet. App. A-6), quoting from *Talik* v. *United States*, 340 F. 2d 138, 140 (9th Cir. 1965). See *United States* v. *Penosi*, 452 F. 2d 217, 220-221 (5th Cir.), cert. denied, 405 U.S. 1065 (1972); *United States* v. *Chikata*, 427 F. 2d 385 (9th Cir. 1970).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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